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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

## No. 1453

MOBIL OIL CORPORATION,
*Petitioner,*

vs.

MARY KATHERINE HUGHES, ET VIR,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Mary Katherine Hughes, et vir, pray that the issuance of a Writ of Certiorari heretofore sought by Petitioner Mobil Oil Corporation be in all things denied and that double costs and damages be awarded for delay.

## I.

## QUESTIONS PRESENTED

1. Whether any Constitutional right of Petitioner Mobil Oil Corporation was violated by the Trial Court in instructing the Jury that the driver of Petitioner's vehicle was negligent in failing to keep a lookout and the Jury could decide if this negligence was a proximate cause of the accident with Respondents' automobile.

2. Whether an employee such as Petitioner's would be in the scope of his employment under Texas law in the circumstances shown by the evidence.

3. Whether Petitioner's sole purpose, or major intent, in seeking relief in this Court is to delay the payment of the judgment against it.

## II.

## ARGUMENT

### Argument and Authorities under First Question

The facts giving rise to the Trial Judge finding Petitioner's driver negligent as a matter of law in failing to keep a proper lookout for Respondents' automobile are summarized in the Fifth Circuit's opinion by Judge Godbold.[1]

Petitioner's driver was obligated to the conduct of a reasonably prudent man. That test in Texas on the trial level can be decided as a matter of law when reasonable men sitting as a jury would not have different opinions concerning the results of the person's conduct.[2] The Federal test seems to be the same.[3]

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1. Opinion attached hereto as Appendix. See page A3 thereof.

2. *Hoey* v. *Solt*, 236 S.W. 2d 244 (Tex. Civ. App. 1951 no writ) opinion by later to be Texas Supreme Court Justice Norvell.

3. *Helene Curtis Industries, Inc.* v. *Pruitt*, 385 F. 2d 841 (United States Court of Appeals, 5th Cir. 1967); *Boeing Company* v. *Shipman*, 411 F. 2d 365 (United States Court of Appeals, 5th Cir. 1969).

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Texas cases applying the reasonable man test, impliedly if not explicitly, were cited by Judge Godbold to affirm the Trial Court's instruction claimed to be in error by Petitioner.[4] In addition to these cases, the Supreme Court of Texas in a five to four decision in which Motion for Rehearing was denied April 29, 1970, has found that proximate cause may be a matter of law.[5] In this most current opinion, the lookout issue in an automobile accident was submitted to the jury who found the Defendant driver negligent in his lookout. However, the jury found the negligence was not a proximate cause of the accident. The Trial Court disregarded the jury's finding to the proximate cause issue and entered judgment for the Plaintiff. The Texas Court of Appeals in reversing the Trial Court was itself reversed.

In this recent Texas case the Defendant driver looked away from his forward view and during the brief time span involved, Plaintiff's automobile was stopped by a signal from a workman maneuvering a telephone pole over the street being traveled. The stopping of the lead vehicle was under unexpected circumstances and without any prior warning signal. The foreseeability element in proximate cause was decided as a matter of law in favor of the Plaintiff. Facts of the case are very similar to Respondents' evidence:

> It is undisputed that Waggoner had looked away to locate house numbers prior to the collision; he testified that he "felt like" he could have stopped in time had he been watching the Clark vehicle and had seen "any light or any indication it was going to stop."[6]

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4. Appendix pp. A3, A4.

5. *Waggoner v. Clark*, 446 S.W. 2d 737 (Tex. Civ. App. 1970), rev. ..... Tex. .....

6. The Texas Supreme Court Journal, Vol. 13, p. 270.

Although it is not mentioned in the Texas opinion, the Appeal Court had to view the evidence in its most favorable light with conflicts in the evidence disregarded in support of the jury's finding that no proximate cause for the accident existed from the negligent lookout.[7] Compared thereto, the Federal Court in its review should consider all of the evidence. And if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes reasonable men could not arrive at a contrary verdict, then a verdict in law is proper.[8]

The Texas case on a very narrow point heavily weighted in favor of a fact issue existing found that it did not exist. Is Respondents' case weaker on judicial review?

Petitioner knows that the remedy it seeks does not exist. That it never has. The law has been clear on driver lookout in automobile accidents under the circumstances here proposed since at least 1951.[9]

**Argument and Authorities under Second Question**

Petitioner having first complained that it was not allowed a jury trial on lookout next complains that it did get a jury trial on its driver's scope of employment. And that is not all: Petitioner has had two different petit juries, two different trial judges, and two different panels of judges in the Federal Appeal Court find that its employee was in the scope of his employment when he injured Respondent Mary Katherine Hughes. The second trial jury saw fit to increase the damages by almost twenty thousand dollars.

7. *Biggers* v. *Continental Bus System*, 303 S.W. 2d 359 (Tex. Sup. Ct. 1957).

8. *Boeing Company, op. cit.*, 411 F. 2d 365 at page 374.

9. *Hoey, op. cit.*, 236 S.W. 2d 244.

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Petitioner continues to cite a workmen's compensation case to take its employee out of his scope of employment.[10] A more liberal view in favor of the workmen is given issues in workmen's compensation cases in Texas.[11] In a "special mission" compensation case the liberal view probably extends beyond the horizon found in respondeat superior causes, but the case quoted from below illustrates the boundary lines within which an employee will remain in the scope of his employment in Texas:

> Under the decisions, we do not think the fact that Bond was killed fifty miles from the lease where he was employed to assist in drilling a well; that he was not killed during the regular hours for which he was employed to work as a roustabout; that he was paid by the hour only for work done on the lease between midnight and 8:00 a. m.; that ordinarily Bond had no duties to perform off the lease; that he was killed between 6:30 and 7:00 p. m. (his hours of employment being between midnight and 8:00 a. m.) by a collision between his own car and that of a stranger on a public street in Merkel either or all show conclusively, that is, as a matter of law, that Bond was not acting within the scope of his employment when he was killed.
>
> * * *
>
> . . . we are of the opinion that if Bond left his home on a special mission for his employer, that is, that he started from his home to that of the driller's to report to him, in accord with the driller's instructions, that he would not be able to work on the next tower and, after having made such report, if he did, without departing from the purpose of said trip, was killed while returning to the point from which he started on such mission, while traveling on a direct route from the driller's home to his own, that it cannot be said, as a matter

10. *Thomas* v. *Travelers Insurance Company*, 423 S.W. 2d 359 (Tex. Civ. App. 1967, writ ref'd n.r.e.).

11. *Shelton* v. *Standard Insurance Company*, 389 S.W. 2d 290 (Tex. Sup. Ct. 1965) at page 293.

> of law, even if he had been fired while at the driller's home, that his mission had been completed and, as a matter of law, that he was not then acting within the course of his employment. . . . Here the jury had a right to conclude that Bond was at the place he was injured and subjected to the dangers of the street because of instructions of his superior to report to him when he could not work and that such report was for the benefit of his employer.[12]

The rule for which Petitioner contends can be found only in the children's game of hide and seek. It is the "Kings X" rule. The rule works wonderfully well for a participant who is about to be "it."

**Argument and Authorities under Third Question**

Petitioner is one of the largest oil companies in the world. It has 300 to 400 oil wells in the Andrews, Texas area, the scene of the subject automobile accident. It can afford to travel every avenue conceivable in legal jurisprudence to get the answers it wants, just like it can afford to spend millions of dollars to drill a hole in the earth to get the oil it wants. The significance and relevance of Petitioner's wealth and power is that it can bide its time and delay by continuous appeals, hoping that time will exasperate to the point of capitulation those who would differ with it. If Petitioner can pursue this policy with impunity, the policy will work more often than it fails. In fact, the policy of delay by appeal has already worked in this very case: There were two young ladies injured in the automobile accident in 1963,[13] and one has long since settled her case. Certainly, the burdens of a second trial and appeal were factors working to expedite that settlement.

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12. *Hartford Accident & Indemnity Co. v. Bond*, 198 S.W. 2d 293 (Tex. Civ. App. 1947, writ ref'd n.r.e.) at page 295.

13. *Socony Mobil Oil Company v. G. C. Taylor and J. P. Sharp*, 388 F. 2d 586 (United States Court of Appeals, 5th Cir. 1967).

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Respondents do not argue to deprive Petitioner of any legal right, but rather contend for Respondents' legal rights in the way of double costs and damages as provided by the Court's rule in cases of delay.[14] Respondents move the Court to award damages in the amount of ten per cent of the judgment, since this appeal is clearly unjustified.[15]

## III.

## CONCLUSION

Petitioner concludes that its employee was on a frolic of his own at the time of the automobile accident. However, it is indeed Petitioner Mobil Oil Corporation who amuses itself with playful activity. Having injured Respondent Mary Katherine Hughes with its automobile, Petitioner should not be allowed to further hurt Respondent by dalliance.

WHEREFORE, Respondents pray Certiorari be denied and double costs with ten per cent damages on the judgment awarded.

Respectfully submitted,

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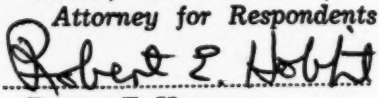

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14. 28 U.S.C.A. Sec. 1912.

15. *Texas & Pacific Railway Company* v. *Prater*, 183 F. 574 (United States Court of Appeals, 5th Cir. 1913, affirmed 229 U.S. 173, 57 L. ed. 1139, 33 S.Ct. 638); *May Department Stores Co.* v. *Reynolds*, 140 F. 2d 799 (United States Court of Appeals, 8th Cir. 1944, cert. den. 317 U.S. 639, 87 L. ed. 515, 63 S.Ct. 31).

## CERTIFICATE

I, Robert E. Hoblit, one of the attorneys for Mary Katherine Hughes, et vir, Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of May, 1970, I served a copy of the foregoing Brief in Response to Petition for Writ of Certiorari on Jack T. Akin, P. O. Box 633, Midland, Texas 79701, Max N. Osborn, P. O. Box 913, Midland, Texas 79701, and Irby L. Dyer, P. O. Box 913, Midland, Texas 79701, Attorneys for Petitioners, by depositing the same in the United States mail with first class postage prepaid, addressed to the said attorneys at their respective above stated addresses.

Robert E. Hoblit

ROBERT E. HOBLIT

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 27313

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MARY KATHERINE HUGHES, ET VIR,
Plaintiffs-Appellees,

versus

MOBIL OIL CORPORATION,
Defendant-Appellant.

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*Appeal from the United States District Court for the Western District of Texas*

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(February 3, 1970)

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Before THORNBERRY, GODBOLD and MORGAN, Circuit Judges.

GODBOLD, Circuit Judge: This is the second appearance of this case in this court. In the first appearance[1] we concluded that the issue of the scope of employment of appellant's employee Jurenka was a matter for the jury. We are presented with neither change in circumstances nor change in the governing law which might make it appropriate for us to conclude that the law of the case should not apply and that we now should reach the opposite conclusion. *e.g., Lincoln National Life Insurance Company v. Roosth*, 306 F.2d 110 (5th Cir. 1962).

1. Socony Mobil Oil Company v. Taylor, 388 F.2d 586 (5th Cir. 1967.)

The intervening case of *Thomas v. Travelers Insurance Company*, 423 S.W. 2d 359 (Tex. Civ. App., 1967, writ ref.) does not represent a change in the law. Appellant's difficulty is not one of changing law but of unchanging facts, i.e., testimony of its own employee that he was on duty on the Sunday in question. The duty encompassed performing specific tasks as they arose. That he caused injury while between specific tasks does not take him off duty.

*Thomas* concerned a tool pusher who was at home subject to call but off duty and free to carry on his own business. Jurenka was a production foreman, appellant's senior man in his line in the geographical area, in charge of 300 to 400 oil wells, and either he or his assistant, or both, were required to be on duty on Sunday. Both were described by Jurenka as being on duty on this Sunday.

Our review of a claim that the verdict is excessive is limited to instances of grave abuse of discretion where the defendant has, as it has here, urged that issue on motion for new trial and its motion has been denied. *Rosiello v. Sellman*, 354 F.2d 219 (5th Cir. 1955). No abuse of discretion by the trial judge appears in this case. Appellant's related contention that appellee's injuries and complaints were as a matter of law not causally related to the accident approaches being frivolous. Appellee testified to neck pain commencing on the day of the accident. She was examined by a doctor the next day and admitted to the hospital where for three weeks she was under treatment which included traction, injections in the neck and back, whirlpool baths and physiotherapy The extent, if any, to which a subsequent fall contributed to her difficulties was for the jury.

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The trial court found Jurenka guilty of negligence as a matter of law in failing to keep a proper lookout and submitted proximate cause to the jury. Lookout usually is a jury question, *Griffith v. Hudspeth*, 378 S.W. 2d 153 (Tex. Civ. App. 1964), *see* 2 Blashfield, *Automobile Law and Practice*, § 104.3 (3rd ed. 1965), but the evidence may be such that there is negligence as a matter of law. *Erck v. Zelios*, 401 S.W. 2d 867 (Tex. Civ. App. 1966); *Hoey* v. *Solt*, 236 S.W. 2d 244 (Tex. Civ. App. 1951).

The evidence in this case was that Jurenka was traveling behind appellee's car in the same (left) lane. He observed appellee's car signalling for a left turn to take place at an intersection, knew there was traffic approaching from the opposite direction, and thought there was time for appellee's car to make the left turn before the approaching traffic reached the intersection. Assuming that appellee would turn ahead of the approaching traffic, and in a situation where neither the action of appellee's car, nor of any other car, required him to do so, Jurenka, the trailing driver, elected to "wheel out to the right" and, taking his eyes from appellee's car, looked in his rear view mirror to see if the way was clear for him to turn into the right lane. When he brought his vision back to what was in front of him appellee's car had stopped to await passage of the on-coming traffic before making its turn. Jurenka was too close to turn out or to avoid appellee's stopped car and struck it from the rear. He acknowledged that if he had been watching appellee's car he would have stopped, let it negotiate its turn, and thus would not have collided with it. Jurenka's failure to keep a lookout was negligence as a matter of law. *Hoey* v. *Solt, supra.* Authorities urged by appellant are not to the contrary. In *LeMaster v. Fort Worth Transit Company*, 138 Tex. 512, 160 S.W. 2d 224 (1942), there was evidence that although LeMaster ran into a bus when it suddenly stopped in front

of him, the bus gave no signal prior to stopping, and LeMaster neither expected, nor had any reason to anticipate, a stop at that place. In *Lovell v. Stanford*, ..... Tex. ....., 386 S.W. 2d 755 (1965), the driver of the lead car testified that she realized she must stop for traffic ahead of her on the freeway, and slowed for that purpose, signalling by both hand and brake lights. Drivers of Cars No. 2 and 3 testified that they were watching Car No. 1 and saw neither hand signal nor brake light. The driver of No. 2 testified that he observed No. 1 slowing down, glanced in his rear vision mirror for a fraction of a second to see if he could turn into the lane to his left and avoid Car No. 1, discovered that traffic in that lane foreclosed this course of action, then looked back at the car ahead of him which stopped so rapidly he was unable to stop without hitting it. In the case before us the testimony of what signal was given is without dispute. Also Jurenka was, on his own testimony, not the victim of an emergency presented by an unanticipated rapid stop—he acknowledged he would not have struck appellee had he been looking.[2]

The evidence was sufficient to raise an issue of excessive speed. Jurenka testified that he was approaching the scene at 25 to 30 miles per hour, that at 30 miles per hour he was traveling approximately 44 feet per second, that when, after looking away, he returned his vision to the scene in front of him he discovered he was within 30 feet of appellee's stopped car. He applied his brakes (and laid down short skid marks) and began to turn to the right in order to avoid appellee's car. But he was unable to prevent the impact. We cannot say that under these

2. Burt v. Anderson, 408 S.W. 2d 572 (Tex. Civ. App. 1966) is not applicable. It concerned a freeway accident, in which rush hour high speed traffic stopped suddenly when a vehicle stalled, and a driver back in the line of traffic, faced with the chain reaction situation in front of him, sought to go into the right lane.

circumstances his speed was at that time, as a matter of law, not excessive.

The court did not err in refusing to let Jurenka testify that if appellee had given a signal to stop at the time the signal to turn was given he (Jurenka) could have stopped prior to the accident. Accepting that practical experience may prima facie qualify one not an expert to express an opinion as to the distance within which an automobile could have stopped, if he knows the relevant conditions, 11 Blashfield, *op. cit. supra*, § 430.1, *El Paso Electric Co v. Whitenack*, 297 S.W. 258 (Tex. Civ. App., 1927), *aff'd* 1 S.W. 2d 594 (1928), in this instance Jurenka was not asked to express an opinion at all. The defense sought to elicit from him an unqualified statement of what he, as a participant, could or could not have accomplished.

AFFIRMED.